IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 19, 2007

STATE OF TENNESSEE v. JOHN W. BIASELLI

Direct Appeal from the Circuit Court for Bedford County
No. 16096 Lee Russell, Judge

No. M2007-00129-CCA-R3-CD - Filed March 20, 2008

Appellant, John W. Biaselli, pled guilty to two counts of possession for resale of a Schedule II controlled substance. He was sentenced to eleven years in prison. On appeal, Appellant contends that the trial court erred in sentencing him to incarceration rather than an alternative sentence involving community corrections. It appears to this Court that Appellant is ineligible for community corrections under Tennessee Code Annotated section 40-36-106(c), the so called "special needs" provision of the Community Corrections Act, because he is ineligible for probation pursuant to Tennessee Code Annotated section 40-35-303. Moreover, Appellant is not eligible for a routine community corrections placement pursuant to Tennessee Code Annotated section 40-35-106(c) because he was found in possession of a weapon at his residence when found in possession of drugs. Finally, Appellant's conduct demonstrated such a lack of potential for rehabilitation that he would not be entitled to community corrections even if he were statutorily eligible.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

A. Jackson Dearing, III, Shelbyville, Tennessee, for the Appellant, John W. Biaselli.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Cameron L. Hyder, Assistant Attorney General; Charles Crawford, District Attorney General; Michael D. Randles and Ann L. Filer, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

In September 2006, Appellant was indicted by a Bedford County Grand jury for two counts of possession of a Schedule II controlled substance for resale. *See* T.C.A. § 39-17-417 (2006). Appellant pled guilty to those charges on November 3, 2006.

At the plea acceptance hearing, the prosecutor stated the factual basis for the charges as follows:

> [O]n July 14th of [2006], agents of the Drug Task Force had a couple of confidential informants working for them. And one of those confidential informants made a controlled buy from a Lot Number 1 of the Couch Lane Trailer Park.
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> The confidential informants, they provided a description of the individual who they had made the buy from. The agents conducted a surveillance on this particular trailer. They observed a sport utility vehicle pull into the trailer park, an occupant go into the trailer and then very shortly come out.
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> They conducted a traffic stop of the driver of that sport utility vehicle. And he admitted to agents that he had just purchased crack cocaine from an individual inside the Lot 1 of the Couch Lane Trailer Park, and provided a description of that individual, which matched the description of the person that the confidential informants had made a buy from earlier in the day.
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> The agents then went to the door, front door of the trailer. They knocked on the door. Before the front door was opened, another door, I guess maybe perhaps it was the back door, opened and they observed the defendant, who they recognize from another investigation, stick his head outside the door and slam the door immediately. And then they could hear him – hear a voice inside, which they believe to be the defendant, running through the house indicating that the Drug Task Force was outside.
>
> The agents then basically grabbed the door and went on in. There were a number of people inside, including the defendant. Th[e] agents began interviewing people and seizing different drugs, various quantities, various types.
>
> They then conducted an interview of the defendant. And he indicated to them that he had acquired some crack cocaine from some drug dealers in Nashville. He indicated he'd actually stolen it from them because they had sold

> fake crack cocaine to him in the past. And that he estimated that it was a block of crack cocaine the size of a block of cheese.
>
> He indicated that he returned to Shelbyville and divided it evenly between himself and some other individuals, essentially everyone taking approximately four ounces of crack cocaine. And he indicated the he had been distributing crack cocaine to various addicts since then.
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> Other persons were interviewed. And they too, indicated that the defendant had been distributing crack cocaine from that location for a period of time. There was some crack cocaine seized that the defendant acknowledged was his.

The trial court accepted Appellant's guilty plea to the two-count indictment. As part of the plea agreement, Appellant agreed to allow the trial court to determine the length and manner of the service of the sentence at the sentencing hearing.

At the sentencing hearing, Laura Prosser, a probation and parole officer, testified that she prepared the presentence investigative report in this case. She said that Appellant provided a lengthy written statement, which she attached to the report. Appellant reported that the last grade he completed in school was the eleventh grade. He quit school because it was "too difficult," and he had intentions of joining the Navy. Appellant enrolled in a trade school, but he failed a test and did not complete the school. Prosser verified Appellant held only one job, which lasted six months and from which he was fired for failing to report. Appellant indicated to Prosser that, if released, he would live with his niece, but Prosser did not know the housing conditions.

Prosser noted Appellant's previous criminal convictions, stating that he had been arrested for public intoxication and failure to appear. The Defendant failed to appear in 2004 and did not appear until 2006, when he pled guilty. The court sentenced him to probation, which was subsequently revoked. Appellant also reported having a criminal history in New York, where he pled guilty to growing cannabis in 1993 and again in 1994, criminal possession of a controlled substance in 1996, and sale of a controlled substance in 2005. He had also been arrested on multiple misdemeanor charges. It was unclear whether any of Appellant's convictions were for felonies.

Timothy Lane, the director of the 17th District Drug Task Force, testified that he supervised the operation that led to Appellant's arrest. He described how crack cocaine, other drugs, and a handgun were found inside the trailer where they found and arrested Appellant. Officers read Appellant his rights, and Appellant gave them a statement in which he admitted to being involved in the distribution of crack cocaine. Appellant relayed to the officers how he had burglarized a home in Nashville and stolen twelve ounces of crack cocaine. He divided it, giving some to other individuals that he knew and keeping some for himself. Officer Lane estimated the value of this crack cocaine to be $168,000. The officer testified that sentences of

incarceration for those convicted of selling cocaine has an immediate impact on the offender and sends a message to other people that may be interested in selling drugs. The officer noted that the recidivism rate in Tennessee is above 90% for drug offenders who do not actually spend time incarcerated.

Appellant testified he was thirty-eight years old and incarcerated on these charges. Prior to being arrested in this case, Appellant had been living for about a month in a trailer with his wife, another couple, and two men from Nashville. Appellant recounted how he had lived in several trailers in several cities and how he had previously attempted to get himself and his wife treatment for their drug and alcohol addictions. Shortly after being released from treatment, Appellant learned his father passed away in New York. He briefly moved to New York and then returned to Shelbyville, Tennessee.

Appellant described his physical health at the time of the hearing as "pretty good," but he recalled that he had previously suffered lower back problems, knee problems, and acid reflux from excessive alcohol use. Appellant testified he also suffers from mental health problems, for which he has sought treatment. He had signed up for the Navy and was scheduled for boot camp when he had a falling out with his foster parents, found out his mother was pregnant, and went back to drinking and using drugs. He "gave up [his] opportunity to go to boot camp." That same year, Appellant received his first DWI and "ended up in a series of trouble after that."

Appellant recounted the story of meeting his wife and then told the court that, if given an alternative sentence, he would live with her in an apartment. Appellant said that he started drinking when he was five years old and that for the last two years he consumed, on average, a case and a half of beer a day. Appellant began using crack cocaine in 1993, and he used between $20 and $100 worth of cocaine every day before he was arrested. Appellant said that, while in jail, he has come to hate drugs and alcohol, which he describes as a gateway drug for him. Appellant assured the court that, if given leniency, he would continue to stay drug-free and would use his life to benefit others.

On cross-examination, Appellant testified that his wife occasionally used crack cocaine with him. He agreed that he knew that the couple that he lived with in the trailer sold crack cocaine, and he had purchased crack from one of them, Patricia, on numerous occasions. He stayed in the "back bedroom" of the trailer, where the task force found crack cocaine, powder cocaine, and marijuana. Appellant said he only knew that the room contained a crack pipe and a $5 "hit worth" of crack cocaine. He and his wife paid $100 per month to stay in the trailer. Appellant acknowledged that a handgun was found in the trailer but said it was not loaded and provided police with the name of the man to whom it belonged. Appellant explained that he had had other jobs besides the one that Prosser verified, but he could not explain why she could not verify those jobs. Additionally, he said that he had participated in a substance abuse program on two previous occasions.

Appellant admitted that he had received probation from different courts "a number of times." When he was arrested in July 2006, he was on probation from general sessions court in

Bedford County. He said he successfully completed his other probationary sentences. Appellant denied ever selling crack cocaine but said he pled guilty because he had an "interest" in the cocaine involved in this case because of his addiction. He said that he lied to the police about owning the cocaine, so he had to plead guilty to that charge despite the fact that he did not own the cocaine but only purchased it. Appellant said that it was a lie that he had gone to Nashville and stole a brick of cocaine. He had neither a car nor a "dime in [his] pocket" at the time of this incident. He said he lied about this incident because he did not want his wife to get into trouble.

Based up this evidence, the trial court made the following findings with regard to alternative sentencing:

> Well, the Defendant does not fall within the parameters of subdivision (5)-40-35-102, so he does not enjoy the presumption of being a favorable candidate for alternative sentencing.
>
> . . . .
>
> The Court will deny alternative sentencing for a number of reasons.
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> The three main factors the Court is to look at [are] whether confinement is needed to protect society by restraining a Defendant who has a long history of criminal conduct. That is clearly true. Not only he has criminal convictions, in this case equally telling is the criminal conduct that he has admitted to which is almost a lifetime of criminal conduct.
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> Also confinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide, and I think it was determined, he is likely to commit a similar offense. I find both of those apply.
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> I accredit Director Lane's testimony that incarceration is both a general and specific deterrent. The other factors or 3, less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the Defendant. Even though that is an either/or thing, I find that both of those apply. The less restrictive measures than confinement have frequently been applied unsuccessfully. The Defendant – have been recently applied unsuccessfully to the Defendant. I find all three of those apply and that is sufficient to require incarceration and deny alternative sentencing. Any one of those alone is sufficient.
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> Furthermore, the Defendant has a poor social history, a poor work history and rehab has been tried and failed. His potential for rehabilitation is poor.

Appellant appeals this order of the trial court.

Analysis

On appeal, the Defendant contends that the trial court erred when it sentenced him to incarceration rather than an alternative sentence involving community corrections. He asserts that he qualifies for community corrections because the crimes he committed were not of a violent nature and because he needs job training.

Alternative Sentencing

In regards to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal history evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6) (2006).[1] A defendant is eligible for an alternative sentence if his sentence is less than ten years. T.C.A. § 40-35-303.

Appellant herein pled guilty to two counts of possessing a Schedule II controlled substance for resale, a class B felony. Based upon the B felony convictions, Appellant receives no presumption in favor of alternative sentencing. Further, as he was sentenced to eleven years, he is not eligible for probation. T.C.A. § 40-35-303. Because Appellant was convicted of a drug-related, non-violent felony offense, however, he is eligible for, but not automatically entitled to, a community corrections sentence. T.C.A. § 40-36-106(a); *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1991).

Community Corrections

The Community Corrections Act was meant to provide an alternative means of punishment for "selected, nonviolent felony offenders . . ., thereby reserving secure confinement

[1]The 2005 amendment removed the language that provided that the described offenders were presumptively eligible for alternative sentencing in the absence of evidence to the contrary and made the guidelines "advisory" in nature.)

facilities for violent felony offenders." T.C.A. § 40-36-103(1); *see also State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). Pursuant to statute, offenders who satisfy the following minimum criteria are eligible for participation in a community corrections program:

> (A) Persons who, without this option, would be incarcerated in a correctional institution;
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> (B) Persons who are convicted of property-related, or drug- or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parties 1-5;
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> (C) Persons who are convicted of nonviolent felony offenses;
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> (D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
>
> (E) Persons who do not demonstrate a present or past pattern of behavior indicating violence; [and]
>
> (F) Persons who do not demonstrate a pattern of committing violent offenses[.]

T.C.A. § 40-36-106(a). Section (c) of this same statute, which is sometimes referred to as the "special needs" provision, states:

> Felony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

However, Appellant is not eligible to be placed on community corrections under the "special needs" provision because, before being placed in community corrections under this provision, an offender must first be eligible for regular probation and, as noted, Appellant is not. *State v. Cowan*, 40 S.W.3d 85, 86 (Tenn. Crim.App. 2000); *State v. Kendrick*, 10 S.W.3d 650, 655 (Tenn. Crim. App. 1999).

Tennessee Code Annotated section 40-36-106(a)(1)(D) specifies that only felons who commit offenses not involving possession of a weapon are eligible for community corrections. In this case Appellant admitted that when found in possession of cocaine at his place of residence a handgun was also recovered from the residence. Thus, Appellant is not eligible for community corrections as a routine placement under section 40-36-106(a). *See also State v. Grandberry*, 803 D.W.2d 706, 708 (Tenn. Crim. App. 1990). Even in Appellant were statutorily

eligible for a community corrections sentence under section 40-36-106(a), his criminal history and conduct indicate a lack of potential for rehabilitation. He was on probation at the time he was convicted of the instant offense, a weapon was found at his place of residence when he was arrested, he has a poor social and work history, and previous attempts at rehabilitation have proven unsuccessful. Under these circumstances the trial court's determination that Appellant is not entitled to a community correction sentence is amply supported by the record.

Conclusion

In light of the foregoing, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE